

A submission to the Tasmanian Department of Health and Human Services consultation “Healthy Tasmania Five Year Strategic Plan”

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Executive Summary:

This submission will address a number of questions raised in section 5.2, “Potential Future Initiatives to target smoking”, of the Healthy Tasmania Five Year Strategic Plan – Community Consultation Draft. Each question has been answered within this submission.

This submission will also address the possibility of legal challenges to these proposed changes, a pivotal consideration when implementing any tobacco control laws. This is due to the aggressive nature of the tobacco industry, as illustrated by their attempts to challenge plain packaging laws in the country and through international treaties.

The evidence provided in my submission illustrates that prevention of initiation of smoking during adolescence has various benefits in terms of reduction of negative smoking behaviors in later life.

I argue that increasing the minimum legal age of purchasing for tobacco to 21 will

benefit both the levels of underage smoking as well as the age of onset of initiation of smoking, due to the greater difficulties that those who are underage would experience in accessing tobacco products. I will also address the question of whether the minimum smoking age should be increased to 25.

Recommendations

Recommendation 1:

The Tasmanian government should increase the minimum legal purchasing age of tobacco products to 21.

Recommendation 2:

Further review of the benefits of raising the minimum legal purchasing age of tobacco products to 25 is required following implementation of the minimum legal purchasing age of 21, as currently there does not exist enough evidence in support of the public health benefits of such a measure.

Prologue:

State governments have largely been given responsibility to implement tobacco control laws and subsequently are responsible for the implementation of the World Health Organization Framework Convention on Tobacco Control (WHO FCTC), which has been a significant force in driving reforms to tobacco laws around the world.

Australia is a signatory to the WHO FCTC and since its formation, the federal and state governments have implemented a variety of the measures provided for within the framework, often leading the charge on many different fronts in the battle against smoking and the tobacco industry.

Per Article 3 (“Objective”) the WHO FCTC aims to:

“to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework for tobacco control measures to be implemented by the Parties at the national, regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke”

Under one of the guiding principles towards achieving this objective, under Article 4 (“Guiding Principles”), it is provided that parties to the agreement should consider “the need to take measures to prevent the initiation”. In proposing to increase the minimum legal purchasing age of tobacco to 21, the Tasmanian government is taking a fantastic step forward in addressing Article 16 (“Sales to and by minors”) as well as

implementing this guiding principal, as evidence indicates that such a measure would decrease the rates or delay the age of initiation of smoking.

Article 16 most generally provides that:

“Each Party shall adopt and implement effective legislative, executive, administrative or other measures at the appropriate government level to prohibit the sales of tobacco products to persons under the age set by domestic law, national law or eighteen.”

The framework leaves open the option for states to legislate their own desired minimum legal purchasing age. Increasing the minimum legal purchasing age is one of the most effective ways to implement the goals of Article 16, as it will make it more difficult for those under 18 (“minors”) to access tobacco products.

Implementation of these minimum age changes, however, poses a challenge in regards to implementation of subsection 1(d) of this article,¹ a suggested measure pursuant to the goals of Article 16, as it would be difficult to restrict those under the age of 21 from accessing tobacco vending machines in licensed entertainment venues.

¹ “(d) ensuring that tobacco vending machines under its jurisdiction are not accessible to minors and do not promote the sale of tobacco products to minors.”

Legal Issues

It is unlikely that there could be any substantive legal challenge by the tobacco industry to these laws, despite their obvious opposition.

As minimum legal smoking age laws are not legislated by the federal government, there is no risk of a high court challenge to changes to the minimum legal purchasing age as well as modification of the tobacco licensing requirements to reflect the new minimum age through breach of s109 of the Constitution.

Lacking any “just terms” provisions regarding acquisition other than for land acquisition within Tasmanian legislation and the Tasmanian constitution, it is unlikely that there could be a challenge to these amendments on any basis of claimed acquisition of property. Regardless, in *JT International SA v Commonwealth of Australia* [2012] HCA 43, it was found that plain packaging laws did not constitute an acquisition of property, as on the basis of the precedent set in *Commonwealth v Tasmania* (1983) 158 CLR 1, there must be some kind of proprietary benefit or gain obtained by the government. If the Australian federal government decided to pursue a minimum legal smoking age of 21 it would likely still stand up despite challenges.

The recent decision regarding the “Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments” has established that tribunals held under the treaty have no jurisdiction to rule regarding such legislative changes as the plain packaging laws, so they would similarly have less jurisdiction in regards to changes to age restrictions as there is no clear “property” or “investment” that may be obtained.

Under the guidelines regarding Article 5.3 of the WHO FCTC, however, it is recommended that parties should enact tobacco control legislation in all branches of government. Article 5.3 requires that parties must “act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law”. Enacting a federal law regarding minimum ages may expose these laws to greater legal challenge due to the “just terms” provisions of the federal constitution (s51(xxxi)), so the most “appropriate government level to prohibit the sales of tobacco products to persons under the age set by domestic law, national law or eighteen” would remain the state government.

While World Trade Organization agreements do not directly exclude public health concerns and regulations from possible purvey (as illustrated by the current challenges in the WTO to the plain packaging laws), it is unlikely that any challenge may be mounted against the Tasmanian government in regards to increasing the minimum legal purchase age under any WTO agreement. This is because, when we consider the agreements that Australia has been pursued under recently for changes to tobacco laws, it is not clear that increasing the minimum age would be relevant. It cannot be considered any barrier to trade, either through a tariff (General Agreement on Tariffs and Trade) or requirement upon product specifications (Agreement on Technical Barriers to Trade), nor does it affect intellectual property rights (Trade-related Aspects of Intellectual Property Rights). Rather it simply regulates tobacco licensing and the minimum purchase age of tobacco, It does not affect the products themselves nor their import/export trade.

Consultation Questions

1. Do you support increasing the minimum legal smoking age to 21?

In the US Institute of Medicine's (2015, 22) report, "Public Health Implications of Raising the Minimum Age of Legal Access to Tobacco Products", it was recognized that the primary public health benefit that raising the minimum legal purchasing age ("MLPA") achieves is to reduce underage tobacco use/access generally and more specifically to delay the age smoking initiation.

By one model, the long term public health benefits that are gained through a decrease in youth smoking initiation probability can be equated to being 7 times greater than equivalent benefits to the public health system that we would see in a comparable improvement in an individuals cessation probability (Tengs, Osgood and Lin, 2001, 1131). So it is imperative that we try to prevent as many people as we can from initiating smoking, both due to the long term benefits to the individuals health but the savings made for our health system that may be better used elsewhere.

Preventing adolescents from initiating smoking is particularly important, as nicotine exposure during adolescence provides a more enhanced nicotinic reward than adults experience and nicotine withdrawals are more tempered for adolescents (Adriani et al. 2006, 382–390; Jamner et al. 2003, 71–87). This makes smoking as an adolescent more subconsciously attractive, while the adolescent brain is naturally more inclined towards risk taking activities during this age period. By preventing their early uptake through increasing the MLPA we can at least give them more of a chance of quitting later in their lives (Lyndon et al. 2014, 323).

Various studies (Reidpath et al., 2014; Breslau and Peterson 1996, 214-220; Chassin et al. 1990, 701; Abdolahinia, Sadr, Hessami 2012, 755) have found that there is a significant inverse correlation between the age of initiation of smoking and negative smoking behaviors later in life.

These negative smoking behaviors correlated with earlier ages of smoking initiation include:

- later ages of cessation (Chen J and Millar 1998, 39)
- high risks of non-cessation (Khuder SA, Dayal HH and Mutgi AB. 1999, 673)
- greater rates of regular/heavy smoking (Taioli and Wynder 1991, 968) and
- more difficulty in quitting and remaining abstinent (Breslau, Fenn and Peterson, 1993, 129).

Even just one year of delay in initiation of smoking was found to be associated with a 24% less chance of being a current smoker as an adult respondent (Azagba, Baskerville and Minaker, 2015).

While we lack a glut of practical examples of the implementation and long term effects (sans the Needham data) of an MLPA of 21 for tobacco, we may look further afield to studies regarding the US' increase of the MLPA for Alcohol from 18 to 21 in the 80s for insight as to the impact and nature of enforcement of the increased MLPAs.

O'Malley and Wagenaar (1991, 478-491), for example, found that states with an MLPA for alcohol of 21 through the period of 1976 and 1987 had lower underage drinking rates when compared to other states within the US where the MLPA for alcohol was still 18.

Inversely, Smart and Goodstadt (1977, 1313-1323) found an increase in underage drinking following a reduction in the MLPA of alcohol in some states from 21 back to 18.

In one study (DiFranza and Coleman 2001, 323–328) it was found that amongst a group of 539 US high school students, where the teen uses social access to gain tobacco underage, 90% of the adults that purchased tobacco for these minors were under 21 years old themselves. So, it's clear that there will be significant public health benefits in decreased adolescent initiation of smoking, unless the laws are perceived as unfair, however similar proposals in the US have received positive feedback from smokers as well as the general public.

2. If so, do you support a phase-in arrangement with respect to those currently legally able to smoke in the 18-20 age cohort?

This would likely result in less opposition to these laws and allow us to steadily introduce the age changes to the public and provide further reinforcement of the benefits of this change.

Public support is vital if this underage access restriction measure of raising the MLPA to 21 is to be effective. It has been established in an Australian based study by Cook et al. (2000, 10), and others overseas that the success of youth access restriction measures in decreasing underage smoking is predicated upon the level of enforcement upon retailers of the laws/regulations regarding advertising and MLPAs.

Research indicates that tobacco retailer's compliance levels (with tobacco laws and regulations) of 80-100% are required in order to see a significant impact upon youth tobacco access (Tutt et al. (2000); Cummings et al. 2003).

However, other studies (Craig et al. 2007, 22-27; Altman et al. 1999, 759-775) have illustrated that even the most expensive enforcement efforts alone could not completely prevent or significantly affect underage tobacco access, due to the varied social sources that many children and adolescents currently to utilize to access/purchase tobacco (Leatherdale and Strath 2007, 105-111).

Therefore, if these laws are to be successful, it will require those who are able to legally purchase tobacco to understand and support these changes, to ensure that social access of tobacco doesn't simply supplement the retail access options that would no longer be available under these proposals (as it is harder to pass off as 21) if properly enforced.

Amonini and Donovan (2006, 276-286) found that an individuals perceptions of the legitimacy of laws that regulate consumption of substances such as tobacco, alcohol and marijuana determines (in part) whether they respect and follow these laws.

There would likely be a decreased probability that people may wish to facilitate underage tobacco access if they understand why the MLPA is being increased to 21 and the significant public health benefits that would come with it.

This should be achieved by steadily phasing in the new MLPA of 21 year by year as suggested, giving the government a generous opportunity to educate the public on this change and the various public health benefits that will come with it.

3. Do you support increasing the minimum legal smoking age to 21, and subsequently increasing it to 25 later, based on evidence of impact?

The minimum legal smoking age should be raised to 21, however based on currently available evidence, it does not appear that there will be a significant benefit to increasing the MLPA to 25 instead of 21.

As stated before, if these laws are to be successful, they must have public support. While the evidence is clear that increasing the MLPA for tobacco from 18 to 21 would have very significant public health benefits, the evidence is not so forthcoming in regards to raising the tobacco MLPA to 25. The US Institute of Medicine's recent report, the "Public Health Implications of Raising the Minimum Age of Legal Access to Tobacco Products"² came to a similar conclusion that the evidence for the public health benefit of increasing the MLPA from 21 to 25 is not as significant or worthwhile in comparison to the benefit gained from raising it from 18 to 21.

For example, amongst adults within the 30-34 y/o age brackets who had reported ever smoking daily, a 2014 US Surgeon General Report (US Institute of Medicine, 2015) regarding the "health consequences of smoking" found that between the ages of 18-21,

² Committee on the Public Health Implications of Raising the Minimum Age for Purchasing Tobacco Products, Board on Population Health and Public Health Practice, Institute of Medicine, 2015. Public Health Implications of Raising the Minimum Age of Legal Access to Tobacco Products. National Academies Press (US), Washington (DC).

a further 19.5% of total eventual daily smokers had tried their first cigarette (bringing it up to 88.5% having had their first smoke by the age of 21), while between the ages of 21 and 25 only 8.3% of the total daily smokers had initiated smoking in this period. It is plainly evident that the overwhelming majority of eventual smokers began in their teens or earlier, so it may be more pertinent to introduce an MLPA of 21, while an MLPA of 25 may not be seen as sufficiently beneficial to public health as to justify peoples perceived inconvenience or loss of their “right to smoke”.

It is vital that the public’s support is established for these laws, because as illustrated by a number of studies, social sources of cigarettes are an enormous portion of underage access to cigarettes (Altman et al. 1999; Leatherdale and Strath 2007, 105-111). If those 25 and above perceive that prohibiting 21-24 year olds from purchasing tobacco is inappropriate, imbalanced or unfair, then attempts to enforce the MLPA will be undermined by social access or possibly even the illicit “chop chop” market.

While high-schoolers may be significantly affected by raising the MLPA to 21 (as they are unlikely to know anyone so far outside their age group) the 21-24 year old bracket is more likely to have a significant proportion of friends who are 25 or older due to the effects of socializing through the workplace/higher education and would have relative ease of social access.

If, however, a stronger case may be established for the public health benefits of increasing the MLPA for tobacco to 25 rather than 21, this option should definitely be investigated.

4. Do you support increasing the minimum legal smoking age to 25? If so, do you support a phase-in arrangement with respect to those currently legally able to smoke in the 18-24 age cohort?

For the reasons above, it is difficult to support increasing the minimum legal smoking age to 25 at this time, as it is unlikely to have a large public health benefit based on currently available evidence. Increasing the MLPA to 25 may serve to undermine the public's perceptions of the public health benefits that these laws can provide. Such a lack of public support would be deleterious to preventing underage access of tobacco as the public is unlikely to assist the government in enforcing these laws, which is pivotal if social sources of underage tobacco access are to be discouraged and minimized.

If new evidence arises that illustrates a stronger effect on preventing smoking initiation as a result of raising the MLPA for tobacco up to 25, then it is definitely worth reconsidering, but at the moment, the public health case for raising it from 21 to 25 is likely not strong enough to justify these changes to the public, who must be kept onside if such a change is to be effective.

5. What impact would there be on tourists and visitors to the State in increasing the minimum legal smoking age and how could these be alleviated?

The limits placed upon the amount of tobacco that an individual may bring into the state without declaration could be tailored to ensure that the typical (smoking) visitor would be able to stock up prior to entry to the state. While evidence is not readily

available on this possible consequence to raising the MLPA to 21 for tobacco (regarding tourism), it is unlikely that someone would choose to avoid Tasmania for their travel plans simply due to these laws. The US has an MLPA of 21 across the country for alcohol, yet there have been no significant studies that have established a causal and deleterious affect upon US tourism as a result of the increase in the alcohol MLPA from 18 to 21 the US witnessed in the 80's.

6. Do you support maintaining the status quo? If so, what are the reasons?

No, it would be recommend that the Minimum Legal Purchasing Age is changed to 21.

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